FOR ARGUMENT



# In the
# Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 77-69.

ALAN MACKEY,
REGISTRAR OF MOTOR VEHICLES OF THE
COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,
*v.*
DONALD E. MONTRYM ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

## Reply Brief of the Appellant.

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## Reply Brief of the Appellant.

### Introduction.

In the course of his brief, the Appellee Montrym presses several points of fact and argument which the Appellant Registrar believes to be inaccurate. Pursuant to Supreme Court Rule 41(3), the Registrar submits this short reply brief to address those points. The reply is organized around the three constitutional criteria governing the need for a prior hearing in the circumstances of this case: (1) the substance of the private

interest in a driver's license and the magnitude of its deprivation under the Massachusetts implied consent law; (2) the risk of an erroneous deprivation under the Massachusetts process; and (3) the countervailing public interest in the treatment of intoxicated driving by the state system in question.

More generally, one mode of the Appellee's argument seems misdirected: its reliance upon peculiar "as applied" facts for a general attack upon the face of a public safety statute. At several points of his brief, Montrym introduces factual colorations which the parties have never agreed upon in the preparation of a record for decision of the general constitutional question presented originally in the district court and now here. The Registrar accepts as true only those facts appearing in the parties' Agreed Statement of Facts and Documents (A. 28-31). He does not accept Montrym's affidavit representations about the circumstances of his accident and arrest (A. 38-39; Brief, 54-55); or his contention about the need for a contempt proceeding to enforce the judgment below (A. 59-60; Brief, 4 n.1). These tactical items, never tested by an evidentiary proceeding, appear in the Appendix at Montrym's insistence and do not relate to his class action attack upon the facial validity of the Massachusetts implied consent law.

## Argument.

### I. Montrym's Description Of The Magnitude Of The Deprivation Of A Driver's License Under The Massachusetts Procedure Is Not Accurate.

Montrym makes two questionable assertions about the degree of injury suffered by a driver facing license suspension in Massachusetts.



First, he suggests that a typical driver will incur an actual suspension of seven to ten days because of delays inherent in the administration of the "same-day" hearing opportunity afforded by the Registrar at the time of license surrender (Appellee's Brief, 31-32). Nothing in the record supports such speculation. The Registrar submits that the usual driver can obtain a hearing opportunity at any one of the 35 Registry offices distributed across the state within one to two days of suspension notice. Simple mistakes will be immediately curable. Closer claims can proceed as expeditiously as the hearing officer receives testimony from the driver and the witnessing police officers.

At the same time, Montrym acknowledges that the seven-to-ten day figure is the usual limit of injury. This time span, if assumed, would not inflict grievous harm, and amounts to a significant concession in the measure of the affected private interest balancing against the law's highway safety objectives.[1]

Second, Montrym relates, from communication with the office of the Illinois Secretary of State, that the license suspension of the kind challenged in *Dixon* v. *Love*, 431 U.S. 105 (1977), is not effective for 30 days (during which a licensee might apply for a hardship permit) (Appellee's Brief, 24-26). Thus, he concludes, the license deprivation in Illinois is far less harmful than that in Massachusetts. This fact, if true, appears nowhere in the decision of *Dixon* v. *Love*. The Court appears to have assumed that suspension was immediate. See 431 U.S. at 109-110 & nn.5-7. The quoted Illinois Rules support that reading. *Id.*, nn.5-7. Thus the notion of a 30-day interim played no material part in the Court's discussion and decision of that case, and no part in the argument and decision

[1] One of the mysteries of Montrym's case remains his failure to exercise his same-day hearing opportunity and to present his state court disposition to a Registry hearings officer (A. 28-29).

of this case in the district court. Consequently, the point is irrelevant and the precedential force of *Dixon* unaffected.

## II. Montrym's Prediction Of The Likelihood Of Error Under The Massachusetts Procedure Is Exaggerated.

Montrym asserts a high likelihood of error under the Massachusetts procedure because of its use of "one-sided form affidavits" (Brief, 39-51) and because of police bias (Brief, 52-53). These contentions are seriously exaggerated.

The affidavit in use is not a mechanical checklist, but requires independent narrative description from the reporting officer. See A. 40-41. In this instance, for example, the officer in the required statement of reasonable grounds for his belief that Montrym had been driving under the influence of intoxicating liquor specified four discrete symptoms of intoxication: the odor of alcohol; glassy eyes; slurred speech; and unsteady footing requiring the driver to hold onto a street marker in order to maintain balance. *Id.*

As to a general theory of police bias, the Registrar finds it difficult to respond to a broad imputation of bad faith or self-righteousness on the part of police officers. Elsewhere Montrym cites Massachusetts legislative history suggesting police reluctance to arrest intoxicated drunk drivers out of concern for the license sanctions (Brief, 68 n.39). Neither generalization is reliable. Instead, the constitutionality of the Massachusetts scheme should turn on the quality of its processes, especially the duty of the arresting officer to describe his observations, and the duty of that officer to support those statements at a same-day hearing before a Registry official.



## III. Montrym's Assertion That The Massachusetts System Presently Allows "Repeat Offenders" To Remain On The Road And That It Thereby Disserves The Public Interest Is Unfounded.

Montrym argues vehemently that the Massachusetts law serves no governmental interest because it subjects him to alcohol education and rehabilitation programs instead of immediate removal from the highway and especially because it authorizes a state court to commit a repeated offender to a program in lieu of license revocation. Montrym's climactic assertion appears at page 65 of his brief:

> The effect of Ch. 505 (a 1975 statutory amendment) was to open the floodgates to repeat offenders by allowing them to enter (and reenter) THE PROGRAM and eliminate their licenses from being revoked.

The floodgate metaphor is particularly careless. A full reading of the governing Massachusetts statutes (Mass. Gen. Laws c. 90, §§ 24D, 24E, as reproduced in Appendices E and F of the Appellant's original brief) shows that placement of a driver in a program always remains in the discretion of a state judge; that a prerequisite for placement is an investigation and report of the driver's history to the judge by the court's probation department; that the report must include all Registry records of the driver and, most importantly, any recommendation by the Registrar concerning the driver's eligibility for early reinstatement of his license; and, finally, that the judge must report the disposition of every case to the Registrar. See Appellant's Brief, 42-43, 47. In this system of judicial discretion, informed by Registry data and recommendation and by probationary supervision of a driver in the program, the recid-

ivist drunken driver is unlikely to meet with an open floodgate.[2]

The institutional role of the Registrar (documented by Montrym, Brief, 65-66) is typically to recommend against program placement of a repeater. A judge encountering a driver who has used up one program disposition can be expected to exercise discretion soundly against another. Indeed, Montrym's sole substantiation of the floodgate phenomenon is a reported estimate that 5 per cent to 10 per cent of program graduates have returned to it (Brief, 67 n.38). The Registrar reads this statistic to mean that in the overwhelming majority of repeated offenses the courts are adopting his recommendation against further program placement and in favor of license revocation. The rehabilitative objectives of the program are not leaving the habitual intoxicant on the highway to endanger the public.[3]

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[2]In this light Montrym's assessment of legislative purpose seems equally wide of the mark (Brief, 68-69):

> Bottom line, the Massachusetts legislature has made a policy determination that drunk drivers, including "the most menacing driver in the country", should be rehabilitated in THE PROGRAM *rather than penalized by license revocation*. Since there is a rational basis for such a determination, and since it was made through the "majoritarian political process", it is entitled to the highest degree of deference by this Court [emphasis original, footnotes and citations omitted].

[3]In his closing discussion of the public interest consideration, Montrym reports that "the number of licensees refusing the breathalyzer test has been steadily declining since the threat of license revocation resulting from the criminal charge of driving under the influence has almost vanished in the light of the passage of Ch. 505 of the Acts of 1975."

The statistics for the calendar years preceding the district court's injunction in March, 1977, do not reflect a "steady decline":



## Conclusion.

For the foregoing reasons and for those argued in the Appellant's original brief, the Court should reverse the judgment of the district court.

Respectfully submitted,

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| *Year* | *Refusals of Chemical Test* |
|---|---|
| 1974 | 6200 |
| 1975 | 6828 |
| 1976 | 6778 |

(Annual Registry enforcement statistics furnished to Montrym's counsel.)

In all events, the expectation remains inherently reasonable that an intoxicated driver confronting a potentially incriminating test will typically refuse it in the absence of a sure sanction. And that refusal will necessitate an evidentiary proceeding in the local courts processing the volume of cases cited in the Registrar's original brief, 34 nn.41-43.